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THE IDEA OF JUDICIAL REVIEW IN THE UNITED STATES OF AMERICA. THE CONTEXT OF CREATING AND EARLY JUDGMENTS OF THE SUPREME COURT

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ABSTRACT

The judicial review owes its popularity primarily to the judgment in the *Marbury v. Madison* case, which gave American courts the power to strike down laws, statutes, and certain government actions that were viewed to violate the Constitution. Although today there is no doubt that the Supreme Court not only has such power but also uses it, we will not find a rule in the US Constitution that in explicit terms, (*expressis verbis*), would give it such competence and its origin may arouse much controversy due to the context of Judge Marshall's judgment. The paper presents the problems of systematizing the role of judicial review in the tradition of American judiciary primarily analysing the first judgements of the Supreme Court as well as the political background associated with the struggle for influence between federalists and anti-federalists.

KEYWORDS: Judicial review, Supreme Court, *Marbury v. Madison* case, institutional balance

1. INTRODUCTION

The actions of individuals remain under the influence of many factors. One of the oldest and most common ways of determining behavior patterns and exercising supervision is legal control, characterized by coercion, formalism, partiality and transparency. Legal control, which evaluation criterion is embedded in applicable legal regulations, requires a number of different institutions that will undertake this task (Kojder 2001, 266-268). As Herbert Pope

wrote “the existence and development of all law, whether fundamental or common, is dependent upon the existence of a court having power to interpret and enforce it. Without the court the law does not exist” (Pope 1913, 45).

The Supreme Court has been expanding itself to the most important judicial body in the United States for over 200 years. One of the most characteristic features that judges possess today is judicial review, understood as “power enables them to declare laws passed by the State legislatures or by the Congress, or actions taken by the executive or governmental agencies, to be unconstitutional and hence avoid” (Vile 2003, 255).¹ Nowadays, we are used to the fact that courts investigate the constitutionality of the law on the basis of which they adjudicate. Although the genesis of this solution is rooted in the seventeenth-century British political tradition and John Lock *jus residenti*, it is only the Supreme Court jurisprudence practice that has granted competence to the adjudication of unconstitutionality of acts with the constitution (Małajny 1985, 247).

The Constitution of the United States of America established in Article III Supreme Court as an element of the judicial power which “extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority (...)” The issues of the establishment of inferior courts were left to the discretion of Congress. Therefore, it was obliged to create a full and effective court system. The first meeting of the new Congress (which lasted from March 4, 1789, to September 29, 1789, in New York) finally resulted in the adoption of 26 acts, including the one adopted on September 24 – An Act to establish the Judicial Court of the United States, also called Judiciary Act (Peters 1845). By the power of this act, Congress created a three-tiered system of federal justice which consists of a Supreme Court with six judges, 3 federal circuit courts and 13 federal district courts. Also, Sec. 25 stated that:

a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, (...) may be re-examined and reversed or affirmed in the Su-

¹ However, one should take some notice here. Judicial review is not a comprehensive coherent concept of adjudging on the incompatibility of acts, but rather a broad way of understanding this phenomenon, which in practice is very different between different countries. First, the control may be specific or abstract, depending on whether the control is prior or subsequent. Secondly, is it only normative acts that are assessed whether this is a broader list of subjects of assessment, for example, administrative decisions. Thirdly (as has already been mentioned) whether the task of examining the constitutionality of acts rests with a specialized, specially appointed body, or whether it is usually done by ordinary courts.

preme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States (Peters 1845, 85-86).

Ultimately, the Supreme Court was established on the principles of the constitution, and the Judiciary Act created the entire judicial system. However, this process was neither easy nor obvious, because the political environment could not agree on the power they wanted to give to the judiciary, especially in the context of creating balance for the legislature.

2. TOWARDS THE JUDICIAL REVIEW

If the main domain of the courts was to settle legal disputes, which were based on specific legal norms or decisions, should there not be an idea for what would be the point of reference? The reference point means the most important act to which the system of jurisprudence is subordinated (considering its hierarchical structure). The law is always subject to change. Therefore, one should look for a fixed element that would stabilize the system. In the case of the United States, it was clear that the constitution could act as their reference point, via the Supreme Court, to ensure adherence to the will of the nation. It could not only balance the legislative power, but also act as a guarantor of the preservation of the fundamental rights and freedoms of citizens.

If we look at the constitution, we will not find in it the concept of judicial review. So, did the founding fathers not consider such a function of the Supreme Court? Establishment of the constitution is a time when two groups - federalists and anti-federalists strongly argued. Anti-federalists were afraid of the central government, arbitrary interpretation of the text of the constitution, politicization of the court, as well as imperious actions in the name of the public good.

The supreme court under this constitution would be exalted above all other power in the government, and subject to no control. (...) I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing (Wootton 2003, 92).

The problem for anti-federalists was not only the constitution but the judiciary itself. They did not believe in justice and equality before the law in

such a system. The very power of the judges raised fears. As noted:

The judges under this system will be independent in the strict sense of the word: To prove this I will shew – That there is no power above them that can control their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature (Ibidem, 94).

One cannot, therefore, find praise for judicial review in such rhetoric. In turn, the federalists were supporters of the constitution and believed that it would act as a guarantor of the fundamental rights and freedoms of citizens.

It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law (Ibidem, 285).

They treated the judiciary as a necessary element hampering the impetus of legislative power. In the end, judicial review was not articulated either in the constitution or in the Judiciary Act. However, the literature has provided much evidence that this court function resulted from both acts. As far as the constitution is concerned, it was argued in various ways. First of all, the text of the constitution and the clause of supremacy are pointed out, granting the constitution a special place in the system of sources of law. Not only did it establish the primacy of federal law over the state, but, first of all, it pointed out that since the law is created to implement the provisions of the constitution, it must undoubtedly be compatible with it. Secondly, the constitutional structure, which is related to its written form and the established power division. In regards of the written form, attention is drawn to the establishment of a difficult procedure for the amendment of the constitution, which, if the judicial review was not admissible in an easy way could be circumvented by the government. In turn, separation of power is connected with the mutual control of individual authorities as well as with the primary duty of judges regarding the observance of the constitution. Thirdly, the Constitution's original understanding. This issue concerns the issues discussed above, i.e. a dispute between federalists and anti-federalists. Although the parties did not come to a consensus, it is difficult to find in their statements that the constitution does not allow for the judicial review and that in the booklets and

newspapers from that period the court function was confirmed (Prakash & Yoo 2003; Sarnecki 2001, 130).

Regarding the Judiciary Act of 1789, it can be said that it clearly acknowledged such competence. First of all in Sec. 8, an oath of judges was established which contained the sentence “I will faithfully and impartially discharge and perform all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States” (Judiciary Act, 1789). If the judge ruled on the basis of a provision that was unconstitutional, he would violate the oath. So, if the legislator did not assume such a court function, the content of the oath should have a different shape. Even better proof that the legislator in this act did not rule out such possibility is mentioned earlier sec. 25.

The political background and legislative attempts to include court competences did not bring the final recognition of judicial review as one of the functions of the Supreme Court, although interpreting the adopted provisions can be seen as above. It is important, however, to emphasize that the discussions around this issue have entered the public sphere. If the Supreme Court was waiting for resolution in disputable matters, it was only a matter of time to question the conformity of a normative act or a provision with the Constitution. It was so simple that the United States Constitution did not regulate all matters in detail, and some of its provisions were written vaguely without specifics. No wonder that as early as 1792, federal courts decided for the first time that they questioned the constitutionality of a federal act and that the case was referred to the jurisdiction of the Supreme Court.

Hayburn’s case from 1792 concerned a congressional act that gave the US Circuit Courts the task of determining the pension claims of disabled war veterans (Hall 2000, 287). For this reason, William Hayburn went to court to determine his claim. He probably did not expect the US Circuit Court for the District of Pennsylvania to consider the congressional statute as unconstitutional. In fact, the US Circuit Court had no doubt that the congress created functions that went beyond the constitutional role and powers of the judiciary in a significant way (Dichio 2018, 48). Later, United States Attorney General filed with the Supreme Court of its own motion an application for the issue of writ of mandamus for this court, so that the judges would act in accordance with what is prescribed by the act passed by the Congress. Although the Supreme Court did not have to question the constitutionality of the act, (ultimately questioned the right of the United States Attorney General to submit a motion *ex officio* and on the basis of which he considered it unacceptable), it was due to the Circuit Court’s action to deal with the case of the lower court, which in fact, required such a settlement (2 U.S. 409).

3. THE CASE OF DANIEL HYLTON *V.* UNITED STATES

The issue of taxes in the United States properly to enact the Articles of Confederation and Perpetual Union, was dependent on Great Britain. With the signing of the Confederation, the process of breaking financial ties with the British crown began. Art. VIII confederation granted the power to tax the states.

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled (U.S. 1781)

The government, therefore, had no legal power to regulate this matter. This power gave the government the Constitution from 1787 in Art. 1 Sec. 2 acknowledging that:

Representatives and direct Taxes shall be apportioned among the several States [which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] (...). (Ibidem)

The state does not have its own income, it functions thanks to those that it manages to enforce in the form of duties or taxes. No wonder, considering the short period of independence from the United Kingdom, that the Congress sought to quickly regulate the issue of taxes in detailed acts, especially so that the legislature had exclusive power to levy taxes directly on citizens. In 5th of June 1794 3rd Congress (1793-1795) established "An Act laying duties upon Carriages for the conveyance of Person". The Act regulated the issue of annual taxation of carriage for the purpose of transporting a person "which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers" (Peters 1848, 478). It should be noted that the act itself was not free of defects. Tax issues always arouse emotions in society. For this reason, the legislator should strive to construct a clear, comprehensive and simple tax system. The carriage tax was really a new solution. The problem arose from the interpretation of the provisions of

the Constitution and the aforementioned Act. As previously noted, according to the constitution, direct taxes were to be divided between states and their implicated duties, imposts and excises (Becker 2008, 23). It is not surprising then that taxation attempts usually met with great resistance from people who were subjected to them. One such person was Daniel Hylton, holder of 125 claims. That's what led to a lawsuit in 1796.

Hylton claimed that the 125 carriages he owned were intended for personal use, not for rent or for transporting people. For this reason, he refused to pay the tax he was obliged to pay under the above-mentioned Act. He believed that the law was unconstitutional because in his opinion it was contrary to the provisions of the Constitution regarding the proportional division of taxes between states based on the census. In this way, the court settled not only whether the act was unconstitutional, but above all whether the tax was a direct tax (Levy 2000, 59-60).

The first opinion was expressed by judge Samuel Chase. In the context of this type of tax, he considered that the tax on means of transport is not a direct tax within the meaning of the constitution and therefore did not have to be divided proportionally between individual states. Moreover, as Judge Chase pointed out:

I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax. As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution (...) (Peters 1835, 86).

The author of the second opinion was judge William Paterson. He focused on an attempt to interpret such concepts as customs, taxes, and excise, as well as the general concept of taxes and the place of direct taxes in this system. He stressed that if the transport tax was a direct tax, it would be contrary to the Constitution. He then concentrated on the principle of division and the principle of uniformity, arguing that the principle of division concerns income tax and land tax, which was a natural consequence of various state situations and their local causes, especially in the case of southern states with extensive and sparsely populated territories. He stated, like his predecessor, that the tax on transport is not a direct tax. He also confirmed the maintenance of the ruling of the previous instance but did not address the constitutionality of the act and the role of the court in this regard (Ibidem, 86-90). The third opinion was formulated by judge James Iredell. He agreed with his predecessors about the constitutionality of transport tax. He noted that the Constitution, in contrast to Confederate articles, was created for in-

dividuals, not for states, and introducing the principle of a division would mean that there is a connection between the number of wagons and the number of inhabitants. Judge James Wilson also approved the above positions, and Judge William Cushing did not issue an opinion (Ibidem, 90-93).

The above ruling was one of the first to raise issues of constitutional compliance adopted by the Congress to an act of laying duties upon carriages for private use. However, it was not a precedent. The issue of the unconstitutionality of the act was raised by the plaintiff and the judges properly (except for Judge Chase) silenced the issue, focusing on other aspects of the case. Therefore, it has not been decided whether the court has any competence to annul a normative act that goes against the Constitution. It is difficult to presume if this was connected with fears of a conflict with the legislative authority or with the simple lack of a need for such a ruling, at a time when the issue of tax directness was adequately addressed.

4. THE CASE OF WILLIAM MARBURY *V.* JAMES MADISON, SECRETARY OF STATE OF THE UNITED STATES

In this case, the Supreme Court was a body functioning for over ten years, and the court system has undergone further changes. On February 27, 1801, the District of Columbia Act was approved by the 6th Congress and was recognized as the organic law of the District of Columbia from 1801. It created two districts: Washington and Alexandria and established a court in each of the new districts. Significant to the above matter, however, it turned out to be an establishment for each of counties judges of the peace. According to sec. 11 “there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the president of the United States shall, from time to time, think expedient, to continue in office for five years.”

In those times, the political context was the weighting of forces between Democrats and federalists. Different perceptions of the role of the government, the autonomy of individual states as well as economic issues were already visible in the work on the Constitution². However, it was only the beginning of the 90s the eighteenth century and an issue with the central bank led to the creation of two strong, opposition parties led by Alexander Hamilton and Thomas Jefferson. Hamilton founded The Federalist Party in 1791. “In general, The Federalist spokesmen were national-minded, con-

² See. Bodenhamer D. J. (2018). *The U.S. Constitution: A Very Short Introduction*. Oxford University Press 2018; Judson K. F. (2013). *The United States Constitution: Its History, Bill of Rights, and Amendments*. New York: Enslow Publishing LLC.

servative, well-to-do members of community who believed that the cure for the 'excess of democracy' was a strong national government" (Miller 1960, 100). On the other hand, freedom of the press, freedom of speech, decentralization of the federal administration and support for state rights were the main ideas of the Democratic-Republican Party, founded by Jefferson in 1792 (Tarr & Benenson 2012, 160; Rusinowa 1994, 36). When we look at the party branch of the House of Representatives, we will quickly notice that the Democrats controlled the 3rd and 4th congresses in 1793-1795 and 1795-1797 after the formation of both parties, when the president's office was held by George Washington. Even the previous significant federalist influences did not allow them to take control of the state. This issue changed radically when the Federalists took over not only power at the Congress (5 in 1797-1799 and 6 1799-1801), but also their candidate, John Adams Jr. who was elected president, and he held this office from March 4, 1797, to March 4, 1801. Unlike the Democrats (until then), the Federalists managed to control both Congress and the Presidency (May, Ides & Grossi 2016, 1-17). But as we say, what goes around, comes around and nothing lasts forever.

The elections to the 7th Congress in 1801-1803 brought great victory to the Democrats and restored the Congress under their control. It was the first blow for the federalists. The second brought the presidential election in which was won by Thomas Jefferson. The outgoing president realized that the Democratic Republican Party had won the congress, the presidential office, but could not win the federal court system. And as Charles S. Bundy wrote "There has probably never been a political contest in our history which occasioned deeper personal resentments than that" (Budny 1902, 261). In the beginning, Adams signed a Judiciary Act of 1801, which reduced the number of Supreme Court judges from six to five and replaced the judges on the perimeter by creating sixteen judges into six court wards. It should not come as a surprise that after the creation of the new 16 judges' offices, the then president, who still holds the office, began to supplement them with his own candidates. On the other side by the power of District of Columbia Organic Act of 1801 he nominated 42 justices of the peace (23 for Washington and 19 for Alexandria) (Ibidem, 259-260). Considering the fact that the nominations took place shortly before the end of the president's term and were a kind of 'gift' for the newly elected president, they went down in history under the name 'Midnight Judges'. The Senate approved all forty-two court appointments, on the last day of Adam as president (Bailey 1981, 18-19).

However, acting Secretary of State John Marshall failed to deliver four of the commissions, including Marbury's. When Thomas Jefferson took office on March 4, he ordered that the four remaining commissions be withheld. Marbury sued the new secretary of state, James Madison, in order to obtain

his commission. The Supreme Court issued its opinion on February 24, 1803 (*Primary Documents in American History* <https://www.loc.gov>)

This is how one of the most important litigations before the US Supreme Court began. In this case, was William Marbury, one of the nominated judges who did not receive the commission. It should be noted here that although Adams' actions were far from ethical and Jefferson repealed the act by which Adams made the appointment, they were made in a proper manner, the Senate agreed, and the problem arose due to Madison who failed the procedure initiated by the previous President. The case complicated because Jefferson reduced the number of posts and manned them from scratch, ignoring the supporters of the Federalist party. Marbury's only solution was to turn to the Supreme Court with a request for the act of nomination (writ of mandamus), a legal measure granted under the Judiciary Act of 1789. The case was so friendly that the chairman was none other than John Marshall, a federalist supporter. The court considered a few issues. The first of these concerned the right to commissions, which, in the court's opinion, enabled the February 1801 file concerning the District of Columbia. The second issue concerned the procedure for nominating a judge and, as stated by the Supreme Court.

Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country. To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right (U. S. 137, 1803).

The third issue concerned the issue of mechanisms for securing infringed rights. In the Marbury's case, it was about granting a legal measure that would allow him to receive the commission and take office (writ of mandamus). It is this element of the ruling that has introduced a new look at the role of the Supreme Court. Judge Marshall noted that the Judiciary Act of 1789, to which Marbury referred, confers powers on the judges of the Supreme Court, which violates Article III of the Constitution itself. The court questioned the legitimacy of the functioning of a national law that is not consistent with the Constitution (U. S. 137, 1803). He decided that the role of the constitution should be considered. Is it a supreme act or an act with the rank of an ordinary law that can be changed when the legislator so chooses. If it is a superior act, then the act which is contrary to it is not a right. If, however, it is treated as an ordinary statute, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable" (U. S. 137, 1803). The court upheld the recognition of the consti-

tution as constituting the fundamental and most important law. But what about the legal acts that are incompatible with it? Do they still bind the courts? The next dilemma concerned the application of provisions inconsistent with the constitution by the courts in the course of the case. As he noted, "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law" (U. S. 137, 1803). The verdict stated that the judges cannot ignore the constitution, they cannot close their eyes. How can you examine the rights and obligations arising from the constitution without examining the instrument on the basis of which they were created? Furthermore, the role of the judges' oaths and promises to perform their duties in accordance with the constitution was recalled. According to this statement, a ruling was refused on the matter, considering the Judiciary Act from 1801 to be unconstitutional. As documented, "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument" (U. S. 137, 1803).

The ruling, in this case, was undoubtedly an important point in the history of constitutional law in America. Clearly confirmed the power of American judges to review the constitutionality of legislative acts. It helped not only shape the judiciary as an independent authority, resistant to political influence but also gave practice to the examination of the law's compliance with the law of a hierarchically higher-order constitutional context. As Ryszard Małajny observes, "from the judgment in the case of *William Marbury v. James Madison*, it appears that the Constitution is an act of the highest legal force, binding on all organs. Therefore, all acts contrary to the Constitution are invalid and the common courts have the right to examine the conformity of these acts, the application of the Constitution and its interpretation. Therefore, if the norms of statutes are contrary to the constitution, the norms of the constitution should be used as a hierarchically higher act" (Małajny 1985, 253). Although the ruling in this matter was not the first to deal with the issue of the constitutionality of federal acts and was criticized, it is impossible to underestimate its role in shaping the idea of judicial review (see: Van Alstyne 1969).

5. CONCLUSIONS

The idea of a judicial review without a doubt, though *expressis verbis* was not articulated in the United States constitution, it found its place in the judicial practice of the supreme court. However, the role of the judgment in the case of William Marbury v. James Madison should not be overstated. Although this is undoubtedly the most popular ruling cited in the context of judicial review, it is hard not to get the impression that the idea of judicial review rooted in Anglo-Saxon political thought has become a convenient solution to the political dispute that put judges in a situation between a rock and a hard place. Although we currently treat judicial review as a universal tool for examining the constitutionality of legal acts and thus an institution that falls within the framework of modern democracy, the first judgments of the Supreme Court treated the idea of judicial review primarily as a tool for political control of both legislature and executive. On the other hand, such a function of the supreme court also confers a special place on the constitution itself, which is no longer just the will of the nation but, above all, a fundamental and supreme law directly applicable.

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